NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA FOURTH APPELLATE DISTRICT

DIVISION TWO

In re K.O. et al., Persons Coming Under the Juvenile Court Law.

SAN BERNARDINO COUNTY CHILDREN AND FAMILY SERVICES.

Plaintiff and Respondent,

v.

A.O.,

Defendant and Appellant.

E065906

(Super.Ct.Nos. J260501 & J260502)

OPINION

APPEAL from the Superior Court of San Bernardino County. Steven A. Mapes, Judge. Affirmed.

Clare M. Lemon, under appointment by the Court of Appeal, for Defendant and Appellant.

Jean-Rene Basle, County Counsel, Danielle E. Wuchenich, Deputy County Counsel, for Plaintiff and Respondent.

Defendant and appellant A.O. (father) is the alleged father of K.O. (a boy, born Jan. 2015) and L.O. (a girl, born Dec. 2013; collectively, the children). K.M. (mother) is the children's biological mother; she is not a party to this appeal. Father appeals from the juvenile court's order terminating his parental rights. Specifically, "father contends the juvenile court denied his due process right to attempt to elevate his paternity status." For the reasons set forth below, we shall affirm the juvenile court's findings and order.

FACTUAL AND PROCEDURAL HISTORY

A. PETITION AND DETENTION

Plaintiff and respondent San Bernardino County Children and Family Services (CFS) received an immediate response referral alleging that K.O., who was four months old at the time, suffered severe neglect. When the sheriff's department responded to a medical aid call, they found K.O. unresponsive. According to K.O.'s mother, she mixed the baby's formula with vodka instead of water. A friend had been drinking vodka from a water bottle and mother claimed she mistook the vodka as water. K.O. was admitted to Loma Linda University Medical Center (LLUMC) to detoxify after he was diagnosed with a blood alcohol level at .316. K.O.'s exam and x-rays revealed that the baby had a possible minimal displace femur fracture. He was also malnourished.

Dr. Amy Young, a forensic pediatrician from the Children's Assessment Center (CAC), stated that K.O. would have had to been force-fed alcohol over a long period of time to have such a high blood alcohol level. At the hospital, K.O. had to be aroused by hospital staff in order to feed him formula. When K.O. did eat, he consumed his bottle

"like he [was] starving." Dr. Young confirmed that K.O. was suffering from malnutrition.

Forensic pediatrician Dr. Mark Massi at LLUMC reported that K.O. suffered neglect and physical abuse. Dr. Massi found a history of alcohol poisoning, a history of being underweight, a concern regarding an abnormal neurological exam, elevated blood pressure, and delayed immunizations. Moreover, mother's explanation for K.O.'s blood alcohol level was inconsistent with the degree of alcohol poisoning. Additionally, K.O. was underweight when hospitalized on May 23, 2015, but gained 90 grams per day between May 23 and May 27, 2015. He continued to gain weight at a rate slightly above average, which was consistent with nutritional neglect. Dr. Massi was not sure about the significance of the right femur irregularity. A repeat skeletal survey was pending. The overextended and crossed lower extremities were also seen in cerebral palsy. Dr. Massi recommended close developmental surveillance.

Mother and her family were hostile toward the hospital staff, and mother threatened to take K.O. home against medical advice. Mother was facing arrest, but law enforcement delayed the arrest until the CAC detective interviewed mother and conducted a further investigation.

Mother would not reveal the whereabouts of 17-month-old L.O. Mother claimed L.O. was with either paternal or maternal relatives, but would not produce any addresses or contact numbers.

When law enforcement officers attempted to detain L.O., they could not find her.

Mother claimed that she did not know the location of L.O. The officers went to see

several relatives, including the maternal aunt, K.M. K.M. claimed that she had no knowledge of L.O.'s whereabouts and suggested that the officers contact paternal grandmother. The officers left a message for the paternal grandmother. She contacted the Child Abuse Hotline and claimed that she had no knowledge about L.O.'s whereabouts. L.O. was finally located in a car with K.M. According to K.M., the paternal grandmother had L.O. earlier in the day. When the relatives heard that CFS was looking for L.O., K.M. took the child from the paternal grandmother.

The police officers investigated mother's home where they found numerous full and empty vodka bottles stored on the same shelf as the water bottles. Mother had a criminal history of substance abuse and was on probation for possession of a controlled substance. Her probation was to end September 17, 2015.

Mother also had a criminal history involving child abuse, and a child welfare history. Because mother was unable to stay clean and sober during her previous dependency case, she lost her four older children (half siblings to K.O. and L.O.). One child was placed with her biological father, two were adopted, and the fourth child was placed in a permanent plan with a guardian.

Father was incarcerated in Salinas Valley. He had a history of domestic violence, battery and burglary. He was not involved with K.O. and L.O. His relatives, however, provided mother with help and support. The children often spent time with the paternal relatives who brought the children to visit mother. Mother told the social worker that she and father were not married at the time of the children's conceptions.

On May 27, 2015, CFS filed Welfare and Institutions Code, section 300 petitions on behalf of the children. The petitions alleged serious physical harm; failure to protect; severe physical abuse of a child under five; no provision for support; and abuse of sibling. (§ 300, subds. (a), (b), (e), (g), (j).)

The detention report of May 28, 2015, recommended that the children be detained in a confidential foster home, with the possibility of no family reunification services.

Father was identified as alleged. At the time of the report K.O. was still in the hospital.

Although father had notice of the detention nearing on May 29, 2015, he was still incarcerated and did not attend. Father's attorney waived reading of the petition, advisal of rights and entered denials. The court found that a prima facie case was established for detention out of the home.

B. <u>JURISDICTION/DISPOSITION</u>

In the jurisdiction/disposition report, CFS recommended that the children be removed from their parents, placed in out-of-home care, and no family reunification services be provided to mother or father. The report continued to identify father as the alleged father.

Father had several felony convictions and was incarcerated in state prison for violent behaviors. He had not taken an active interest in protecting and providing for K.O. and L.O. He had not demonstrated the ability or desire to parent. He had also been incarcerated for a significant period during the children's lives.

¹ All further statutory references are to the Welfare and Institutions Code unless otherwise specified.

Mother denied marrying father and denied any other possible fathers. She claimed father had never paid child support, and could not remember if he had signed any of the birth certificates; father had not. At the time of the report, father was still incarcerated at Salinas Valley Prison.

At the jurisdiction/disposition hearing on July 9, 2015, father was present and in custody. Mother set the matter contested. Father waived his presence for trial at the contested hearing. The court specifically confirmed with father that he wanted to waive his presence at the contested hearing. The court further informed father of the potential consequences if he failed to attend the hearing; not only would the court be hearing the jurisdiction allegations, but also the disposition recommendation of no services. Father stated that he understood the consequences of waiving his presence.

At the contested jurisdiction/disposition hearing on August 25, 2015, father was not present. He was in state prison and had waived his presence. The court noted that father "may wish at some point to elevate his status from alleged to presumed [father]. [¶] Is that correct, [father's counsel]?" Counsel responded affirmatively. The court noted that father always had the option for that.

The court found that K.A. came within section 300, subdivisions (b), (e), (g), and (j). The court found that L.O. came within section 300, subdivisions (b), (g), and (j). As to disposition, father's counsel stated mother would testify that father was present during the pregnancy of K.O., and at the hospital at the time of birth, but had to leave for work, and was not on the birth certificate. Father supported and held K.O. out to be his own.

As to L.O., father was incarcerated at the time of her birth. When he was released, he supported L.O. and mother during her pregnancy with K.O.²

Children's counsel argued that father was present at the initial jurisdiction/disposition hearing and could have asked for a paternity test. His name was not on the birth certificates. He did not satisfy the presumed father requirements.

Moreover, the jurisdiction/disposition report clearly indicated that father's status was that of an alleged father not entitled to services. Also, because father was an alleged father, he was not entitled to visitation.

The court recalled that father "was present in July and waived his transport and appearance at the jurisdiction and disposition hearings—and I remember the incident clearly. He specifically wanted to be transported back to state prison and not participate in the process." The court then found that father "is not entitled [to] receive reunification services. He is deemed alleged." The court ordered no reunification services for father. Father's counsel did not object to any of the court's findings.

The court again noted that father was not on the birth certificate, was not present at the births, did not request paternity testing when he was in court, waived appearance for the hearing addressing jurisdiction/disposition, and confirmed his alleged status.

The court advised counsel for mother and father of parents' writ rights. The court then set a section 366.26 hearing to determine the children's permanent plans. Since father was absent, he was sent the forms Notice of Intent to File Writ Petition (JV-820)

² Father was incarcerated at the time of K.O.'s birth in January 2015. It is unclear whether father was incarcerated at the time of L.O.'s birth in December 2013.

and Petition for Extraordinary Writ (JV-825) on August 25, 2015. Neither parent filed an extraordinary writ.

C. PERMANENCY HEARING

On September 24, 2015, CFS submitted a request to the court for approval of surgical treatment of K.O. At the time of the request, father's whereabouts were unknown. The social worker called father twice but was unable to contact him.

On October 9, 2015, at the notice review hearing for the section 366.26 hearing, father did not appear until the end of the hearing. After he arrived in court, his counsel requested a paternity test. CFS objected to the request given the lateness in the proceedings. The court denied father's request. Father did not seek review of the order

The section 366.26 report recommended that the children receive permanency planning services from adoptive services. At the time of the report, since the children were not placed in a concurrent home, CFS requested a 90-day continuance to allow the plan of adoption to be implemented. At that time, two nonrelated extended family members were being assessed for concurrent placement.

Although father was not ordered visits, he sometimes visited with mother. CFS received a report that father had attended a visit with mother to celebrate L.O.'s birthday at McDonald's. Mother did not appear comfortable with father there; the two were arguing. Father gave L.O. a present, but then took the present back.

At the permanency planning hearing on December 23, 2015, father was not present. Father's counsel requested visitation with the children; the court denied the

request. The court continued the hearing. During this 90-day period, father did not file a section 388 petition for change or modification of a previous order.

On March 17, 2016, CFS filed a first addendum report recommending parental rights be terminated and the permanent plan of adoption be implemented. The children were placed together in a prospective adoptive home.

At the continued hearing on March 22, 2016, father was present. His counsel asked for a continuance to file a section 388 petition, which the court denied for lack of good cause. The court found the children adoptable, terminated the parental rights of all parents, known and unknown, and ordered adoption as the permanent plan.

On April 26, 2016, father filed his notice of appeal, which specified that he was only appealing the findings and orders of the court terminating his parental rights on March 21, 2016.

DISCUSSION

A. <u>FATHER HAS WAIVED HIS RIGHT TO CHALLEGE THE</u> PATERNITY STATUS FINDINGS³

Father contends that his due process rights were violated when the juvenile court failed to conduct a paternity inquiry as required under section 316.2. CFS asserts that father waived this objection by failing to raise it in the lower court. We agree.

³ CFS contends that father does not have standing to appeal the court's order. We address the merits of father's appeal because he appeared in the case and was a party to the proceedings. (*In re Emily R.* (2000) 80 Cal.App.4th 1344, 1358.)

At the jurisdiction/disposition hearing on July 9, 2015, father was present, in custody, with his counsel. Father acknowledged receipt of the section 300 petitions and waived a formal reading of the petitions. Mother set the matter contested. After some discussion regarding the trial date, the court set the trial for August 6, 2015, and informed the father that he had "a right to be present during the jurisdiction disposition trial," then asked, "are you telling the Court at this time that you wish to waive your presence at the trial." Father responded that if the trial could not be postponed until he was out of custody, "I would like my presence to be waived, yes, ma'am." The court went on to warn father that the court would not only be hearing evidence regarding the allegations, "but the recommendation of no family reunification may apply to [father] and the Court may follow that in which [father] won't receive reunification services." Father responded, "I would like, your Honor, reunification services, but I don't want to be present in custody when I'm in trial." When defendant asked if he could address reunification services once he was out of custody, the court replied that father could "always file a 388 and request reunification services if the Court denies them initially." Thereafter, father's counsel reiterated that father and he discussed that he was waiving transport and appearance at the contested trial. Counsel stated: "[Father], we talked about it and you understand you have a right to be present at your hearing that's set currently for August the 6th and you are stating that you do not wish to remain here in the county jail and you wish to be transported back to state prison?" Father responded, "Yes, sir." During this hearing, father did not request a paternity test.

At the contested hearing on August 25, 2015, the court found as follows: "[Father], who was present in July and waived his transport and appearance at the jurisdiction and disposition hearings – and I remember the incident clearly. He specifically wanted to be transported back to state prison and not participate in the process. He is not entitled [to] receive reunification services. He is deemed [an] alleged [father]." Father's counsel did not object to the finding that father was an alleged father and the court's order denying father services and visitation. Father also did not object to not having receiving Form JV-505. At the end of the hearing, the court stated: "The Court has set a hearing to make a permanent plan for your child. If you wish to preserve your right to appeal the Court's decision, you must file a petition for extraordinary writ." The court then went on to outline the procedures for filing the writ. Thereafter, father was sent the appropriate forms to file a writ; he, however, did not file a writ. Father did not request a paternity test at this hearing. Father also did not file a section 388 petition to request reunification services.

On October 9, 2015, at an appearance review hearing, father appeared late for the hearing. At that time, father's counsel indicated that father "would like paternity test." The other parties objected and the court noted that the court took "juris" of the case and the hearing was "for a notice review and appearance review for placement." The court then denied father's request.

In this case, father is barred from raising the issue of elevating his status to presumed father on appeal because he was required to raise the issue by writ petition, before the juvenile court's section 366.26 ruling terminating parental rights. (§ 366.26,

subd. (*l*); Cal. Rules of Court, rule 8.452; *In re Ricky H*. (1992) 10 Cal.App.4th 552, 561, 563; *In re Tabitha W*. (2006) 143 Cal.App.4th 811, 816.)

Under the waiver rule, "an appellate court in a dependency proceeding may not inquire into the merits of a prior final appealable order on an appeal from a later appealable order." (*In re Meranda P.* (1997) 56 Cal.App.4th 1143, 1151.) This is because, "[t]o permit a parent to raise issues which go to the validity of a final earlier appealable order would directly undermine these dominant concerns of finality and reasonable expedition." (*Id.* at p. 1152.) But "[a]s explained in *In re Janee J.* (1999) 74 Cal.App.4th 198, 208 . . . , the *Meranda P.* rule is not absolute. '[T]he crux of *Meranda P.* [is that] the waiver rule will be enforced unless due process forbids it.' . . . Thus in the usual case, application of the waiver rule will not offend due process." (*In re S.D.* (2002) 99 Cal.App.4th 1068, 1079-1080.)

Father argues that he "did not waive his right to appeal the juvenile court's violation of his due process right to attempt to elevate his paternity status because . . . the waiver rule will not be enforced when due process forbids it." According to father, "[d]ue process requires that an alleged father be given notice of dependency proceedings and 'an opportunity to appear and assert a position and attempt to change his paternity status.""

This case presents a case of waiver, and not a due process violation. As will be provided below, father was given notice of the dependency proceedings, had an opportunity to appear and assert his position. There was no due process violation.

As provided above, this case was initiated in May 2015 and parental rights were terminated 10 months later, in March 2015. Father received notice of the detention hearing and subsequent hearings. Father was represented by counsel in the proceedings below. Father appeared at the first hearing in July 2015. He also could have attended the contested jurisdiction/disposition hearing, where his status would have been addressed and assessed. However, father decided to waive his right to appear because he wanted to be transported back to state prison instead of staying in county jail while awaiting the hearing. Father could have challenged the order denying him reunification services via a section 388 petition; he did not do so. Thereafter, at an appearance review hearing in October 2015—seven months after the commencement of the case and two months after the contested hearing—father requested a paternity test. When the court denied the request, father could have filed a section 388 petition or a writ petition; he did not file either. Then, five months later, at the permanency hearing, father asked for a continuance to file a section 388 petition. Father had 10 months to address his paternity issue, but did not. Father was released seven months prior to the termination of his rights and had notices and opportunities to be heard, and had notices and opportunities to challenge the orders via writ or section 388 petitions. Father cannot now raise the issue of his paternity on appeal when he had failed to address the issue down below and through the proper procedures. Hence, we hold that due process does not forbid enforcing the waiver rule in this case.

B. ANY ALLEGED ERROR WAS HARMLESS

Even assuming that there was no waiver and the alleged errors were committed, there was no prejudice because the purported due process violations are evaluated under the standard of harmless beyond a reasonable doubt. To prevail, father bears the burden of showing that he was prejudiced by the lower court's alleged errors. "It is a basic general principle of California law that the court will not presume prejudice even if error is shown. [Citation.] 'The *burden is on the appellant*, not alone to show error, but to show *injury* from the error." (*Marina County Water Dist. v. State Water Resources Control Bd.* (1984) 163 Cal.App.3d 132, 139, quoting 6 Witkin, Cal. Procedure (2d ed. 1971) Appeal, § 290, p. 4277; see Cal. Const., art. VI, § 13; Code Civ. Proc., § 475.)

""Dependency law recognizes three types of fathers: presumed, alleged and biological.' [Citation.] A biological father is one whose paternity of the child has been established, but who has not established that he qualifies as the child's presumed father under Family Code section 7611. [Citation.] 'A man who may be the father of a child, but whose biological paternity has not been established, or, in the alternative, has not achieved presumed father status, is an "alleged" father.' [Citation.] [¶] . . . Due process for an alleged father requires only that he be given notice and an opportunity to appear and assert a position and attempt to change his paternity status, in accordance with procedures set out in section 316.2." (*In re Kobe A.* (2007) 146 Cal.App.4th 1113, 1120.)

Section 316.2, subdivision (b) provides: "If, after the court inquiry, one or more men are identified as an alleged father, each alleged father shall be provided notice at his last and usual place of abode by certified mail return receipt requested alleging that he is

or could be the father of the child. The notice shall state that the child is the subject of proceedings under Section 300 and that the proceedings could result in the termination of parental rights and adoption of the child. Judicial Council form Paternity-Waiver of Rights (JV-505) shall be included with the notice."

California Rules of Court, rule 5.635, which implements section 361.2, provides: "If, after inquiry by the court or through other information obtained by the county welfare department or probation department, one or more [men] are identified as alleged [fathers] of a child for whom a petition under section 300, 601, or 602 has been filed, the clerk must provide to each named alleged [father], at the last known address, by certified mail, return receipt requested, a copy of the petition, notice of the next scheduled hearing, and [Judicial Council form] *Statement Regarding Parentage (Juvenile)* (JV-505) unless: [¶] (1) The petition has been dismissed; [or] [¶] (2) Dependency or wardship has been terminated; [or] [¶] (3) The [man] has previously filed a JV-505 form denying paternity and waiving further notice; or [¶] (4) The alleged parent has relinquished custody of the child to the county welfare department."

Here, after father was identified as an alleged father, CFS sent him notice of the jurisdictional hearing, which stated that the children were the subjects of proceedings under Welfare and Institutions Code section 300, and that the proceedings could result in the termination of parental rights and adoption of the children. It appears that Form JV-505 was never sent to father. Nonetheless, we conclude that the error in this case was harmless since it did not result in a miscarriage of justice. (*In re Kobe A., supra*, 146 Cal.App.4th at p. 1122.) Even if he had received the Judicial Council form advising him

of the actions to take to establish his paternity status, father would not have been able to meet the statutory elements to be declared a presumed father under Family Code section 7611. He was not married to mother, nor is there evidence or even a claim that he attempted to marry her; he could not establish presumed status under Family Code section 7611, subdivisions (a), (b) or (c). Under subdivision (d), a man can be a presumed father if he "receives the child into his . . . home and openly holds out the child as his . . . natural child." There was no evidence to show that father did either. Neither K.O. nor L.O. ever resided with father. Moreover, father was incarcerated during a substantial portion of L.O.'s life. Although mother admitted that she relied on father's relatives to help her care for the children, she clearly stated that father never paid any child support nor was he involved with the children. There is no evidence to show that father demonstrated a full commitment to his parental responsibilities.

Father was ultimately deprived of the opportunity to establish presumed father status because he failed to attempt to do so promptly upon receiving notice of the juvenile dependency proceedings and representation. We cannot condone such delay when time is of the essence in establishing a permanent home for a young child. To allow father, who was imprisoned for most of L.O.'s life, to delay months before attempting to establish presumed father status would be contrary to the purpose and intent of the juvenile dependency legislation, which encourages providing children with a stable living environment expeditiously. "[A] child's need for a permanent and stable home cannot be postponed for an indefinite period merely because the absent parent may envision renewing contact with the child sometime in the distant future. [Citations] ['The reality

is that childhood is brief; it does not wait while a parent rehabilitates himself or herself. The nurturing required must be given by someone, at the time the child needs it, not when the parent is ready to give it'].)" (*In re Daniel M.* (1993) 16 Cal.App.4th 878, 884.)

Ultimately, whether or not father sought to change his paternity status, the course of the dependency case would not have been different. On this record, we conclude father was not prejudiced by the juvenile court's failure to comply with the notice requirements of section 316.2 and rule 5.635.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

		MILLER	J.
We concur:			
RAMIREZ	P. J.		
HOLLENHORST			